



LRX/42/2006

**LANDS TRIBUNAL ACT 1949**

*LANDLORD AND TENANT – service charges – Landlord and Tenant Act 1985 section 27A – construction of lease – jurisdiction of Leasehold Valuation Tribunal to order restitutionary payment of overpaid service charges – failure to comply with consultation requirements of section 20 as amended of 1985 Act.*

**IN THE MATTER OF AN APPEAL FROM THE LEASEHOLD VALUATION  
TRIBUNAL FOR THE NORTHERN RENT ASSESSMENT PANEL**

**BETWEEN**

- (1) WARRIOR QUAY MANAGEMENT  
COMPANY LTD**  
**(2) JOMAST DEVELOPMENTS LTD**

**Appellants**

**and**

- (1) CAPTAIN Z C JOACHIM**  
**(2) DAVID C HEWITT**  
**(3) P STANIFORTH**  
**(4) NIGEL TURNER**  
**(5) CLIVE R WAKLEY**  
**(6) PHILIP A HARRIS**

**Respondents**

**Re: Flats at Quayside,  
Hartlepool,  
Cleveland,  
TX24 0XB**

**Before: His Honour Judge Huskinson**

**Sitting at Hartlepool County Court  
on 1 and 2 November 2007**

*Mr Dominic Bayne instructed by Crutes LLP for the Appellants*  
The Respondents appeared in person.

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The following case is referred to in this decision:

*Sinclair Gardens Investments (Kensington) Ltd v Wang and Others* LRX/87/2005

## DECISION

### Introduction

1. The Appellants appeal from a decision of the leasehold valuation tribunal for the Northern Rent Assessment Panel (“ the LVT”) dated 30 December 2005 whereby the LVT decided certain matters in relation to the service charges payable in respect of various properties at the Quayside, Hartlepool, the decision being made upon applications to the LVT made by the Respondents (and others) under section 27A of the Landlord and Tenant Act 1985 as amended.

2. At all times material to the applications to the LVT the various Respondents held their respective premises at Warrior Quay from Jomast Developments Ltd (the second Appellant) as lessor. Warrior Quay Management Company Ltd was at all times the Management Company for the purposes of the Respondents’ respective leases. At all material times until 1 July 2005 J Monk & Co acted as the managing agent on behalf of the First Appellant. At all material times Mr S J Monk was a director of (and in effect the controller of) both the Appellants. He was also the principal of J Monk & Co.

3. The LVT identified the following issues for decision:

#### Issue 1

Had the Management Company and Jomast fulfilled their obligations under paragraph 3 of Part 3 of the Seventh Schedule to the leases and, if not, did this preclude them from legitimately demanding and receiving Service Charge payments?

#### Issue 2

Was Mr Monk on behalf of the Management Company and Jomast entitled unilaterally to vary the Service Charge percentages specified in Paragraph 2c of Part 3 of the Seventh Schedule to the leases?

#### Issue 3

Had the management of the properties been satisfactory and, if not, were the charges for the management shown as part of the Service Charges justified in whole or in part?

#### Issue 4

Was the painting and pre-painting work carried out in 2004 such as to fall within the statutory consultation requirements and, if so, were those requirements complied with?

#### Issue 5

Were the leaseholders in Admiral House able to require the installation of UPVC windows and were they entitled to refuse access for the painting and pre-painting work to be carried out?

4. The LVT reached a decision on Issue 1 to the effect that the Appellants had failed to fulfil their obligations under the provisions of the lease mentioned in relation to Issue 1 and that this failure had the result that nothing whatever was payable by way of service charge by any of the Respondents for any of the service charge years in question. The result of this conclusion was that the LVT made an order against both Warrior Quay Management Company Ltd (“WQMC”) and also against Jomast Development Ltd (“Jomast”) requiring them to repay to the Respondents the various amounts which those Respondents had paid by way of service charge on account over the relevant years.

5. The LVT directed itself that its determination on Issue 1 was sufficient to dispose of the matter, but the LVT went on to give its decision on other Issues “in the hope that they will assist the parties for the future operation of the Service Charge provisions of the leases,” (see paragraph 126 of the LVT’s decision). It seems clear that these decisions by the LVT on the subsequent Issues can be properly taken to be decisions by the LVT which are made not merely by way of obiter observations but by way of actual decision intended to be effective in so far as the LVT’s decision on Issue 1 was incorrect (the contrary was not argued before me by Mr Bayne).

6. In summary the LVT upon these other Issues reached the following conclusions:

- (1) As regards Issue 2 it concluded that the service charges would be payable on the basis of the percentage set out in the relevant leases and on no other basis, because there had not been any properly certificated alteration of such percentages as contemplated by the terms of the leases.
- (2) As regards Issue 3 it concluded that the standard of management provided by WQMC (under the management of Mr Monk acting on behalf of WQMC and on behalf of the managing agent J Monk & Co) was very low, but that the amount charged by way of management charges was also very low. The LVT therefore concluded that if any service charges were payable for the relevant years, then the management element of them was not unreasonable.
- (3) As regards Issue 4 the LVT concluded that the statutory consultation requirements set forth in section 20 as amended of the 1985 Act had not been complied with and that the amount recoverable in respect of those works must be limited to £250 per tenant. The LVT also made adverse findings regarding the standard of the works carried out.
- (4) As regards Issue 5 the LVT agreed that the leaseholders could not require the installation of UPVC windows – in other words if such windows were to be installed this would have to be by agreement between the Respondents and the Appellants.

7. Having made these findings the LVT then went on to decide, in respect of each Respondent for each service charge year for which that Respondent had applied to the LVT, as to how much by way of service charge that Respondent was obliged to pay for each such year, supposing that the LVT were wrong on its decision on Issue 1 and that therefore some service charge was payable for these years rather than nothing at all being payable.

8. Permission to appeal to the Lands Tribunal was granted to argue the points raised in the grounds of appeal subject to the following conditions:

“(a) the [Appellants] are not entitled at the hearing before the Lands Tribunal to challenge the findings of fact made by the LVT; and

(b) the hearing before the Lands Tribunal will be by way of review (and subject to condition (a) above) and not by way of re-hearing.”

9. At the hearing before me the only Respondents who had indicated an intention to respond to the Appellants’ appeal are as noted in the title to this decision. The hearing proceeded as contemplated in the conditions attached to the grant of permission to appeal. No evidence was called and no attempt was made by the Appellants to argue that any of the LVT’s findings of fact were incorrect. I heard submissions from Mr Bayne on behalf of the Appellants. Each of the Respondents also addressed me in person.

### **The Facts**

10. As indicated above, the facts are to be taken as found by the LVT. The LVT has helpfully and fully set out its findings of fact. I will not repeat such findings, save to draw attention to certain particular points.

11. The Respondents between them held upon the terms of one or other of four types specimen lease which were before me in the supplementary bundle between pages 1 and 119. For the purpose of this decision it is sufficient to make reference to certain terms of one of the leases as this will adequately draw attention to the relevant points under consideration in these proceedings.

12. I take by way of example the lease dated 7 February 1996 in respect of 7 Spinnaker House. The lease was made between Jomast (under its then name of Jomast Construction Ltd) as the Landlord and WQMC as the Management Company and also Hartlepool Renaissance Ltd as the Tenant. The terms created by the leases relevant to these proceedings have become vested in the various Respondents. By the lease the relevant premises were demised for a term of 125 years at the rent of a peppercorn (if demanded) and subject to the various other covenants and provisions therein contained. In particular there is a covenant on the part of the Tenant in the Fourth Schedule paragraph 2 in the following terms:

“By way of additional rent and without any deduction to pay to the Management Company by the direction (hereby given) of the Landlord the General Service Charge and the Flat Service Charge which shall be paid:

(a) by way of payments on account:

(i) for the period from the dated hereof to 30<sup>th</sup> June or 31<sup>st</sup> December next ensuing (whichever shall be the earlier) the sum of [ ] (such payment to be made on the date hereof); and

- (ii) for each subsequent period of six months for the remainder of the Term such sum as the Management Company shall reasonably deem appropriate to take account of anticipated future General Service Costs and Flat Service Costs (each sum to be paid in advance)
- (b) as to any balance due (following the certification of the General Service Charge and the Flat Service Charge pursuant to Part III of the Seventh Schedule hereto) forthwith upon receiving the summary referred to in Clause 3 of Part III of the Seventh Schedule hereto (credit being made in the Management Company's books of account at the rent and on the terms and conditions hereinafter appearing General Service Charge and/or the Flat Service Charge for subsequent periods)"

13. The General Service Charge and Flat Service Charge were to be calculated as laid down in the Seventh Schedule Part III as a certain percentage of (respectively) the General Service Costs and the Flat Service Costs. Part III of the Seventh Schedule constituted a covenant by WQMC in the following terms:

- (1) "To keep (or cause to be kept) proper books of account showing:
  - (a) the General Service Costs and (separately) the Flat Service Costs;
  - (b) receipts by way of payments relating to the General Service Charge and the Flat Service Charge; and
  - (c) any other payments made or received by the Management Company
- (2) At least once a year to procure that its auditors or accountants shall:
  - (a) prepare an account of the income and expenditure of the Management Company in respect of the matters mentioned in Clause 1 of this Part of the Schedule;
  - (b) certify the total amount of the General Service Costs and (separately) the Flat Service Costs for the period to which such account shall relate;and
  - (c) certify the amounts due from the Tenant in respect of the General Service Charge and (separately) the Flat Service Charge which amounts shall be calculated as follows:
    - (i) General Service Charge – 0.929% of the General Service Costs
    - (ii) Flat Service Charge – 12.894% of the Flat Service Costs

unless (taking due consideration of all relevant factors) the auditors or accountants shall reasonably and properly consider that some other method of calculation and/or apportionment is appropriate

- (3) To send a summary of the said accounts and certificates to the Tenant as soon as practicable after they shall have been prepared”

14. I will not set out at length the definitions of General Service Costs and Flat Service Costs. It is sufficient to note that these, coupled with definition of the Demised Premises, made provision to the effect that the General Service Costs included the costs of repairing and decorating etc, and insuring the structural walls, roofs and foundations of the Buildings in the Development as defined.

15. It is also notable (as recorded by the LVT) that the definition of the Development varied as between the leases, with the Development being an extended area in respect of certain leases and a restricted area in respect of other leases. This difference in the description of the Development appears to be a result of the way in which the Warrior Quayside Estate was developed. Thus it has been developed in at least two phases, with the original phase (in which I was told that all of the present Respondents’ premises are situated) being developed prior to Jomast becoming involved, and with there being a further development by Jomast which in fact involved more units than had originally been contemplated. This has given rise to problems in that it is said by the Appellants that the terms of the leases as regards payments of service charges do not make sense (or perhaps more precisely do not make sensible provision) if the service charge obligations are interpreted as set forth in the various leases. No steps have been taken either by way of agreed variation of the leases or by an application to LVT under the Landlord and Tenant Act 1987 section 35 (and following) for a variation of the leases so as to make the service charge provisions work satisfactorily having regard to the way in which the Warrior Quayside development has ultimately been built out.

16. The LVT found (and this was in any event accepted by the Appellants) that the Appellants had not complied with the provisions of Part III of the Seventh Schedule in that there had never, in relation to any of the service charge years relevant to these proceedings, been procured from WQMC’s auditors or accountants a certificate as contemplated in the Seventh Schedule and as referred to in the Tenant’s covenant in paragraph 2 (b) of the Fourth Schedule.

17. This absence of any such certificates from the relevant auditors or accountants led the LVT to reach the conclusion that nothing whatever was payable by any of the Respondents for any of the relevant service charge years.

18. So far as concerns Issue 2 the LVT made the following findings in paragraph 100:

“The Respondent or the Management Company, in the person of Mr Monk, unilaterally varied the percentages shown in paragraph 2 (c) of Part 3 of the Seventh Schedule to the various leases to take account of the extent to which the development of the Extended Development Area had taken place. He did not seek the agreement of the various leaseholders nor were they aware that he had made the alterations. Neither the accountants nor the auditors of the Respondent or the Management Company had made or advised any adjustment to those percentages.”

As a result the LVT concluded that, if services charges were payable at all for the relevant years, they were payable on the basis of the percentages set out in the relevant leases and on no other basis.

19. The LVT drew attention to numerous failures by WQMC (as controlled by Mr Monk and as acting through J Monk & Co, which in turn was controlled by Mr Monk). These failures by Mr Monk include those recorded in the LVT's decision in the following paragraphs:

- (1) The purported unilateral variation of the relevant percentages in the leases (see paragraph 100 of the LVT decision – already cited above).
- (2) The failure to provide copies of the audited accounts of WQMC (paragraph 101).
- (3) The failure ever to supply any statement to the leaseholders showing on a yearly basis and in sufficient detail to be reasonably easily understood what had been expended on the services provided and what had been received by way of Service Charge and what the reserve was (paragraph 103).
- (4) The fact that all attempts on the part of the various leaseholders to obtain information about the Service Charge were either ignored or inadequately dealt with (paragraph 104).
- (5) The fact that all of the maintenance or repair work (except external painting) was carried out either by WQMC itself by one of the other companies in the Jomast group and was generally carried out in an unsatisfactory way (paragraph 106).
- (6) The numerous failures by Mr Monk (on behalf of WQMC and J Monk & Co) in respect of the major external painting works carried out in 2004 – these failures included failure to ensure a proper initial inspection, failure properly to notify and to consult the leaseholders upon the proposed works (thereby failing to comply with section 20 of the 1985 Act) and a failure to secure that the painting work was done adequately either as regards the pre-painting work or the painting work itself (paragraphs 107 to 114 and paragraph 130).

20. I have already noted the LVT's findings on its Issue 3 and its conclusion that the standard of management was very low. A further failure by Mr Monk, on behalf of the Appellants, was his failure properly to comply with directions given by the LVT for the production of documents. He personally represented the Appellants before the LVT. The LVT made an order dated 15 June 2005 which contained directions requiring the First Appellant (referred to as Monk Property Management) within a month to serve on the Respondents and on the LVT

“... its statement of case responding to the items disputed by the [Respondents] together with any supporting documents. The response to include consolidated or overall accounts for service charge for the development for each of the years in issue and copies of the accounts and demands sent to the [Respondents]. Also to include copies of all documents in their possession relevant to the matters in dispute



including those upon which they seek to rely in evidence. This will be regarded as the [Appellants'] case.”

At the hearing before me Mr Bayne accepted that this order had been properly made by the LVT and received by the First Appellant and no point was raised that this order wrongly named the addressee as Monk Property Management. I was also told that the LVT made a further specific order for disclosure of service charge accounts on 4 October 2005, this being the day prior to the first day of the hearing before the LVT and being substantially prior to the second adjourned day which was 3 November 2005. In fact Mr Monk only produced some documents, which even then were not certified accounts as contemplated by the leases, and he did this by way of enclosure with his written closing submissions which were submitted after the close of the hearing. The LVT declined to take these into consideration bearing in mind the breach of the orders for disclosure and the fact that these documents had not been before the LVT at the hearing and had not been documents which the leaseholders could consider or make representations upon.

### **The Statutory Provisions**

21. The LVT has set out in paragraphs 118 and following of its decision the provisions of sections 19 and 20 of the Landlord and Tenant Act 1985 as amended and also the provisions regarding the consultation requirements under section 20 and also the provision of section 20C of the 1985 Act. I will not repeat these. In paragraph 124 the LVT makes reference to section 27A of the 1985 Act which has, with effect from 30 September 2003, expanded considerably the powers of the LVT and has given the LVT power to determine whether a service charge is payable and if so to whom, by whom, the amount, the date by which it is to be paid and the manner of payment. The LVT did not consider section 20ZA(1) of the 1985 Act as amended which provides the following in relation to the consultation requirements in section 20:

“Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works ... the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.”

### **Issue 1**

22. I propose to deal with the LVT's decisions on the various Issues (in so far as they are subject to appeal) in sequence, starting with Issue 1 on which the LVT concluded that nothing was payable by way of service charge for the relevant years and that in consequence there should be made restitutionary payments by the Appellants to the various leaseholders.

23. The LVT concluded in paragraph 127 that it was a condition precedent to there being payable any sum by way of Service Charge (i.e. by way of General Service Charge and Flat Service Charge) that WQMC had complied with paragraph 2 of Part III of the Seventh Schedule and had procured that its auditors or accountants had prepared the relevant certificates and had sent the same to the leaseholders. The LVT noted that this had not

occurred and this is what led the LVT to conclude that nothing was payable and that restitutionary payments should be made.

24. The Respondents asked me to uphold the LVT's decision on Issue 1 and the consequential order made by the LVT for repayment by the Appellants to the Respondents of sums paid. On behalf of the Appellants Mr Bayne advanced the following arguments:

- (1) He agrees that the provision of a certificate as contemplated in the Seventh Schedule is indeed a condition precedent to there becoming payable the final balancing sum by way of service charge for the year in question.
- (2) However he argues that the provisions of the Fourth Schedule require there to be paid by the leaseholders as an on-account payment "such sum as Management Company shall reasonably deem appropriate ...". He points out that the provision of a certificate from the auditors or accountants is not a condition precedent to the obligation to pay this on-account sum. Indeed it would be a contradiction in terms to require such a final certificate prior to something being paid on account.
- (3) Mr Bayne argues that the only sums which the Appellants have ever demanded from the leaseholders are sums which are payable by way of on-account payments. The Appellants have not purported to make a demand for a final balancing charge. If they had done so they could have been met with the defence that no such balancing charge was payable prior to the requisite certificate being served. However, the on-account payments were properly payable.
- (4) Mr Bayne argues that the leases cannot be read as meaning that if certificates as contemplated (i.e. from the auditors or accountants) are not provided in accordance with the Seventh Schedule, then this means that the amount of service charge payable for the year in question is to be taken as finally determined at zero. He argues that clear words would be needed for such a result. He contends that failure to serve the certificates means that WQMC cannot obtain any balancing charge, but that there is nothing to prevent WQMC retaining the on-account payment for the time being or from eventually providing the relevant certificates so that the accounts can ultimately be finalised.
- (5) I asked Mr Bayne whether this meant, on his argument, that WQMC could retain the on-account payments in perpetuity and could continue in perpetuity to demand merely on-account payments and could deliberately decline ever to provide the relevant certificates, such that there could never be a final settling (until such moment, if ever, as chosen by WQMC to provide the relevant certificates) of the relevant service charge years. Mr Bayne accepted that this would not be an acceptable situation and he contended that it did not arise on the construction of the leases. He argued instead that it was open to a tenant seek finality by making an application under section 27A of the 1985 Act to the LVT. On such an application the LVT, even if there was no appropriate certificate from an auditor or accountant, had the power to reach a final decision

as to how much was payable. So far as concerns quantum, if WQMC had omitted to provide the relevant certificates then this would weigh against WQMC and the result might be that the LVT would, on the information available to it, reach a conclusion that a lesser sum was payable than WQMC might wish or that its auditors or accountants might ultimately certify. If the LVT did make a finding as to how much was payable for a particular year, then if the amount was more than what had been paid on-account the shortfall would not be payable by the leaseholder until the condition precedent had, belatedly, been satisfied and a certificate showing that at least the amount decided by the LVT was properly payable. If the belated certificate purported to show more to be payable than the LVT had decided, then the amount payable by way of shortfall would be limited to the difference between the amount paid on account and the amount decided by the LVT. If the certificate showed less to be payable than decided by the LVT, then the amount payable by way of shortfall would be limited to be assessed by reference to this lesser amount as certified. He further argued that if the amount decided by the LVT as the amount of service charge payable for the year in question was less than the amount paid on account then the leaseholder was entitled to have the benefit of this finding immediately and without having to wait for the relevant certificate from an auditor or accountant (as to the practical effects of this benefit see the subsequent arguments dealt with below).

25. It is clearly unsatisfactory that WQMC has failed to comply with its obligations under the Seventh Schedule Part III paragraph 2. However, I am unable to read the lease as meaning that if WQMC has failed to comply with this provision then this automatically thereby proclaims that in respect of the service charge year to which the failure relates WQMC had lost the right to be paid any service charge whatever, such that the entirety of any sum paid on account must be dealt with on the basis that the leaseholder is either entitled to credit for this sum or to be repaid (as to which see below) the whole of the amount paid on account. I agree with Mr Bayne that for this dramatic result to ensue from a failure to comply in proper time with the obligation under the Seventh Schedule Part III paragraph 2 would require clear words. However, I also conclude that WQMC cannot take advantage from its own breach of covenant and cannot unilaterally put off into the future the ability of a tenant to obtain finality of decision as to how much is payable for a particular year. Section 27A of the 1985 Act clearly contemplates that a tenant can apply to an LVT to obtain a binding decision on this point. I therefore also agree with Mr Bayne's submissions that, if in such circumstances a leaseholder does make an application to the LVT for a decision (as happened in the present case), the LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against WQMC and may result in the LVT deciding that a lesser sum than hoped for by WQMC may be decided to be the amount payable. Also the absence of the certificate should result in the position being that the amount which is decided by the LVT to be payable by way of shortfall will not be payable until a proper certificate (certifying that at least this amount is payable) is provided by WQMC's auditors or accountants. However, if the LVT's decision is that the service charge payable for the relevant year is less than the sum paid on account, then the leaseholder is entitled to the benefit of that decision immediately (and without waiting for a certificate from the relevant auditor or accountant).

26. In connection with the foregoing points it may also be noted that the leases contemplate that the leaseholders will become members of WQMC and also that the freehold of the Development will in due course be transferred to WQMC. It is thus contrary to the interest of the leaseholders for the true construction of the lease to be such that the Management Company (of which they are to become members) should be deprived of the ability to obtain any service charge payments whatever for a particular service charge year if the provisions of the Seventh Schedule Part III paragraph 2 are broken. I consider that the lease can be construed against its factual matrix and the intention of the parties as disclosed by the documents including the point that I have just mentioned. This is a further reason why clear words would in my view be needed if a breach of the relevant provision of the Seventh Schedule was to deprive WQMC from getting any payment of service charge at all for a particular service charge year, as this would appear to be a result contrary to the leaseholders' interests as members of the Management Company and contrary to their interest as leaseholders, because if the Management Company has no funds it would be unable properly to manage the Development.

27. In the result therefore I conclude, with respect to the LVT, that the absence of the required certificates from WQMC's accountants or auditors did not have the effect of making nothing at all payable by way of service charge for the relevant years. The LVT went on, quite rightly, to consider how much would be payable by way of service charge supposing that the conclusion that nothing was payable was incorrect. I understand the sums so found by the LVT have the result that the amounts that have already been paid on account by the Respondents were more than the amounts found to be payable by them. Before coming to the quantification of the amount payable, it is first necessary to deal with certain subsidiary arguments on Issue 1 raised by the Appellants, namely, what is the obligation of the Appellants in respect of the sums overpaid (i.e. the difference between the sums paid by each Respondent on account in respect of any relevant year and the amount found by the LVT to be payable by that Respondent by way of service charge for that relevant year). The Respondents asked me to uphold the LVT's order that the Appellants repay to the Respondents the overpayments.

28. I can deal with these points comparatively briefly as I reach the following conclusions thereon, substantially for the reasons advanced in argument by Mr Bayne:

- (1) The terms of the lease do not make provision for re-payment to a leaseholder of the amount by which the payment on account made by that leaseholder for a relevant service charge year exceeds the amount finally decided by the LVT to be payable for that year. Instead the provisions of the Fourth Schedule paragraph 2(b), albeit strangely worded (indeed it seems something has gone wrong with the text), make provision for credit to be made in WQMC's books of account in respect of the overpayment. Thus the leases themselves make provision for how the overpayment is to be dealt with and do not contemplate a re-payment. Instead credit is available against the leaseholder's obligations to make future payments to WQMC.
- (2) Even if the foregoing were wrong, I conclude that the LVT did not have jurisdiction to order the Appellants to make restitutionary payments to the leaseholders. The jurisdiction of the LVT is set forth in the 1985 Act and in particular in section 27A. The LVT has power to determine whether a service

charge is payable and if so to whom, by whom, the amount, the date by which it is to be paid and the manner of payment. It does not have jurisdiction to go on and order an overpaid landlord to repay an overpaying tenant (even if the lease made provision for such re-payment – which the present lease does not). Accordingly Mr Bayne’s subsidiary arguments regarding the question of whether any equitable defences arose, by way of change of position or otherwise, so as to prevent any such restitutionary order being made do not arise.

29. Before proceeding to Issue 2 there are two further points which can be dealt with here:

- (1) Mr Bayne on behalf of Jomast complained that the LVT erred in adding Jomast as a party to these proceedings. However, it may be noted that no objection was taken at the hearing before the LVT to Jomast being joined. Also, as confirmed by Mr Bayne, the complaint regarding Jomast being joined was specifically directed towards the fact that a remedy (namely a restitutionary order) was made against Jomast. No objection to the joinder of Jomast was made if no such adverse order against Jomast was to be included in the order of the LVT (or now the Lands Tribunal). Having regard to the matters set out above I have concluded that no restitutionary order can be made against Jomast. Accordingly as I understand it no continuing objection to the joinder of Jomast is pressed. In any event I see no reason to conclude that the LVT was wrong in joining Jomast.
- (2) It was further originally argued in the Appellants’ grounds of appeal that:
  - (a) these present applications by the Respondents to the LVT for determination of the service charges payable could not have effect in respect of any sums paid before 30 September 2003 (because of the commencement provisions regarding section 155 of the Commonhold and Leasehold Reform Act 2002) and
  - (b) in any event the Respondents (or some of them) should be taken to have agreed the amount of the service charges for at least some of the service charge years by reason of having paid the sums demanded and having delayed for such an allegedly long period before raising any complaint.

30. So far as concerns point (a) above, Mr Bayne no longer pressed that argument having regard to the decision of the Lands Tribunal in *Sinclair Gardens Investment (Kensington) Ltd v. Wang and others* LRX/87/2005. As regards the point (b) above, I reject it for the following reason. As made wholly clear by Mr Bayne in his submissions on Issue 1, all of the sums so far demanded from the Respondents for any of the presently relevant years are sums payable not by way of final service charge payment but by way of payment on account. I am unable to see how the payment, without immediate or early protest, of an amount which is merely payable on account (with the lease contemplating that there will ultimately be certified the final amount for the relevant year) can be taken as an agreement not to dispute the amount finally payable for that year. The Respondents argued that none of them should be taken to have agreed the amount payable for any service charge year. I accept that argument.

## LVT's Issue 2

31. In paragraph 128 of its decision the LVT referred to the provisions in the closing words of paragraph 2(c) of Part III of the Seventh Schedule which contemplate that there may be a variation in amount payable by a particular tenant by way of General Service Charge or Flat Service Charge. The relevant words read:

“unless (taking due consideration of all relevant factors) the auditors or accountants shall reasonably and properly consider that some other method of calculation and/or apportionment is appropriate.”

However the LVT pointed out that neither the auditors nor the accountants had purported to vary the method of calculation or the percentages. What had happened is that Mr Monk himself had purported to alter these matters, but the LVT found (correctly) that Mr Monk did not have power to do this. As a result the LVT concluded that if, notwithstanding its determination on Issue 1, some service charges were payable, then they were payable on the basis of the percentages set out in the relevant leases and on no other basis.

32. The nature of the problem which has arisen includes (but may not be limited) to the following points which I give by way of summary. Some of the leases in the Quayside Development were granted when the Development (as defined by the leases) constituted a smaller area comprising only 36 units. Others of the leases at the Quayside Development had been granted with the Development comprising a larger area involving 136 units. Leaving aside a particular further problem regarding the units which constitute dwelling houses rather than flats, the position regarding the flats is that there exist two elements of the service charge, namely General Service Charge and Flat Service Charge. The former is a small proportion of the General Service Costs (e.g. 0.929% reflecting a Development of 108 units, which was at one point contemplated, or 0.736% reflecting a Development of 136 units), and the latter constitutes a substantial proportion of the Flat Service Costs (e.g. 12.894% which reflects the number of flats in a block and the size of the flat). Also the way in which the General Common Parts are defined (as including the main structure and roof and foundations of relevant Buildings) results in the costs of repairing and insuring that Building falling within the General Service Costs and not the Flat Service Costs. This fact, coupled with the piecemeal way in which the entire development has been built and the amount of the percentages applied in the various leases to the General Service Costs (in order to calculate the General Service Charge) and to the Flat Service Costs (in order to calculate the Flat Service Charge) results in oddities if the service charge payments are calculated strictly in accordance with the provisions of the leases. For instance, I was told that in respect of the lease of 4 Maritime Close (Mr Wakley's property) he is required to pay 1.252% of the insurance premium payable for the entire Development of 136 properties, whereas Mr Turner at 12 Admiral House is only obliged to pay 0.736% of the insurance premium payable on a development of 32 properties.

33. The Appellants submitted that in order to harmonise the charges and to make the charges more appropriate, certain departures were permissible from the strict terms of the leases regarding the calculation of the General Service Charge and the Flat Service Charge. They submitted that such departures should have been adopted by the LVT and can now, on appeal, be adopted by the Lands Tribunal. These departures included the following:

- (1) The Appellants submitted that so far as concerns the payment by the leaseholders of insurance premiums, these should have been calculated not as part of the General Service Charge (which is how the LVT calculated it and how the leases provide for calculation) but should instead have been dealt with on a block by block basis as part of the Flat Service Charge, such that each leaseholder would pay a higher percentage of a smaller amount.
- (2) The Appellants also submitted that the percentages payable by way of General Service Charge should be harmonised at 0.736% (reflecting a development of 136 units) because some leaseholders are being asked to pay 0.929%.
- (3) The Appellants also submitted that certain building specific expenses (e.g the costs of repairs to the structure of a particular building) should not be dealt with as part of the General Service Charge (and therefore spread across all the leaseholders in the Quayside development with each paying a small percentage) but should instead be dealt with as part of the Flat Service Charge (so as to be paid only by the leaseholders in that Building, each paying a larger percentage).

34. Mr Bayne submitted that there was a further problem regarding the tenants of the houses in Maritime Close because these were indeed houses rather than flats, such that having regard to the definition of the Demised Premises under the leases of such houses the structure of the houses did not fall within the General Common Parts, with the result that the leaseholders of these houses should be repairing their own properties and insuring them, but that these leaseholders were nonetheless required also to pay a percentage of the General Service Costs, which included the costs of insuring and repairing the structure of the other Buildings on the Development. Mr Bayne told me that in fact WQMC does insure and continues to insure the premises at Maritime Close and also has in fact effected repairs to the structure. However this problem was said to be a further reason justifying departure from the terms of the leases. As regards this latter additional problem which is said to exist in relation to the houses in Maritime Close, I make no findings as to the position under the leases thereof as to whether Mr Bayne's submission on these points is correct as it is not necessary for me to do so. I do, however, hope and trust that any Respondent who has a lease of a house in Maritime Close (and indeed any other leaseholder who has a lease of such a house) will take care to ensure, in consultation with WQMC, that these properties are indeed insured.

35. I have set out above the provisions in Schedule 7 Part III paragraph 2 (c) regarding the circumstances in which the auditors or accountants can, if they consider this appropriate, alter the method of calculation or apportionment for the General Service Charge and the Flat Service Charge. It is contemplated that this is to be done within the year-end certificate provided by such auditor or accountant whereby there is certified the matters contained within paragraph 2 of Part III of the Seventh Schedule. It is accepted that no such certificate from an auditor or accountant for any of the service charge years relevant to the LVT's decision has been given. Accordingly there was no evidence before the LVT that "taking due consideration of all relevant factors the auditors or accountants [do] reasonably and properly consider that some other method of calculation and/or apportionment is appropriate". Indeed there was evidence that no auditor or accountant had done any such thing for any of the relevant years. In these circumstances I agree with the LVT that the only basis upon which the General Service Charge and Flat Service Charge can be calculated for any particular leaseholder is in

accordance with the percentages laid down under that leaseholder's lease – and the categories of expenditure to be included within the General Service Costs and the Flat Service Costs for that leaseholder must also be calculated in accordance with the definition of these expressions in that leaseholder's lease. The fact that there was before the LVT, at pages 583-586 of the bundle, documents which apparently show that in 1993 the then acting auditors/accountants Binder Hamlyn calculated some service charges for 1-11 Admiral Way, Admiral House for the year ended 31 December 1992 in the manner there stated, which I was told included a departure from the strict terms of the leases, and the fact that it was asserted to me (but not proved or found by the LVT) that payments on account have been demanded by the Appellants assessed on a similar basis over a period of many years, does not in my judgment cure the failure to comply with terms of the leases so far as concerns justifying a departure from the method of calculation and/or apportionment there laid down. As to whether so far reaching a departure as is sought by the Appellants from the terms of the leases can properly be effected by a certificate of an auditor or an accountant under paragraph 2 of Part III of the Seventh Schedule is not a matter I need consider.

36. I therefore find that the LVT was correct in concluding that the service charges must be calculated in the method and upon the basis of the apportionment as laid down in the various leases. The Respondents asked me to uphold the LVT's decision on this point and I do so. I can see that the present situation is unsatisfactory and it would appear to be in the interest of all parties that some formal method of altering the basis of calculation and the relevant apportionments should be found. WQMC and the Respondents (and perhaps other leaseholders) may wish urgently to explore these matters, which may require an application to the LVT under the Landlord and Tenant Act 1987 section 35 (and following) for a variation of the relevant leases. The present case does not involve any such application under the 1987 Act. The Lands Tribunal does not have jurisdiction on the present appeal to impose some solution to the problems (even if I knew what the appropriate solution might be – which on present information I do not) and nor did the LVT have any such jurisdiction.

37. One further point should be noted in regard to the method of calculating the service charges. I was told that the LVT, in calculating for each of the Respondents the amount of service charge payable for each of the relevant years, had in fact not strictly followed the method of calculation and apportionment as laid down in the leases. However this was not raised as a point in the grounds of appeal and no permission to raise such a point was given in the grant of permission to appeal and I do not permit this extra point to be raised now. In any event this point would, I was told, have made little difference in the ultimate amount payable by each leaseholder. The point concerned whether the general maintenance and window cleaning and asbestos surveys should be dealt with as part of the Flat Service Charge or as part of the General Service Charge.

### **LVT's Issue 3**

38. There was no appeal from the LVT's finding on Issue 3 and I need consider that no further.



#### LVT's Issue 4

39. The LVT dealt with this in paragraph 130. It concluded, correctly, that the Appellants had not complied with the consultation provisions in section 20 of the Landlord and Tenant Act 1985 as amended. In the result the LVT concluded that, if any service charges were payable for the year 2004/2005, the amount was limited to £250 for each of the leaseholders in respect of the major works of external painting.

40. The Appellants through Mr Bayne complain that the LVT did not raise (but should have raised) with Mr Monk, who was appearing in person on behalf of the Appellants, whether he wished to apply for dispensation from the consultation provisions. Mr Bayne argued that the LVT should in any event have considered whether such dispensation should have been granted.

41. The LVT clearly took a firm view regarding the merits (or lack of them) so far as concerns the Appellants' position. It is probable, in my judgment, that had the LVT addressed its mind to the question of dispensation it would have concluded that dispensation should not be granted. However the LVT did not address its mind to dispensation at all and did not invite Mr Monk to make an application for dispensation. In my judgment the LVT was in error here. Where there is a hearing before an LVT and there is an absence of a formal application for dispensation from a landlord (or at least from a landlord not professionally represented) I consider that the LVT should ask the landlord whether it wishes to apply for dispensation, rather than not raising the point and omitting to consider at all whether dispensation should be granted under section 20 ZA of the 1985 Act. The LVT having omitted to act in this manner, I must now consider the question of dispensation and I must do so by making up my own mind upon the point rather than merely adopting the conclusion which I have inferred the LVT would probably have reached.

42. In summary the position was as follows:

- (1) The Appellants did not comply with the consultation provisions of the new section 20 and the Service Charge (Consultation Requirements) (England) Regulations 2003.
- (2) Nor did the Appellants even comply with the provisions of the old consultation requirements under the old section 20. Thus the leaseholders were not consulted in any way about what work should be carried out by way of painting and pre-painting repairs nor who should carry out the work nor what the cost might be. Also, the work was started within a very short time of J Monk & Co's letter of 23 September 2004, see paragraph 112 of the LVT decision.
- (3) The inspection by Sanderson Weatherall prior to these works being authorised was inadequate, being only an external inspection of the properties from ground level, and much of the work of a pre-painting nature was either not carried out at all or was carried out inadequately (paragraph 109 of the LVT decision).
- (4) Preparation work for painting (carried out by Bell & Co) was clearly not adequate (paragraph 110 of the LVT decision). Also the work (not just the pre-

painting but also the painting work itself) was not carried out to a reasonable standard, see LVT's decision paragraph 130.

- (5) It is true that the LVT in paragraph 130 concluded that the contractual sum of £51,810.45 for Bell & Co's work "was not unreasonable assuming that any defects in that particular work were put right". However there was no evidence before the LVT, or before me, that these defects had been put right.
- (6) Further, and despite Mr Bayne's arguments to the contrary, I consider that if there had been proper consultation on the question of these major external decoration works, then such consultation may well have included consultation on the subject of whether, anyhow as regards some of the Buildings, it would be preferable to replace the windows with UPVC windows rather than to repaint the existing windows. I note that Mr Wakely, Mr Hewitt, Mr Stanniforth and Captain Joachim ultimately put in UPVC windows. Accordingly if there had been proper consultation it is possible that a substantial proportion of the painting costs could have been avoided.

43. In these circumstances I am not satisfied that it is reasonable to dispense with the consultation requirements. I am aware that this will mean that WQMC will be unable to recover from the Respondents as part of the service charge the costs of carrying out these works. This may leave WQMC with a shortfall which, unless it can be made good in some other way (for instance by a claim against J Monk & Co, as to the merits of which claim I do not express a view), may have to be made good by a contribution from every leaseholder in the Quayside development, having regard to the fact that I understand that all such leaseholders are now members of WQMC. However these potential difficulties for WQMC are not sufficient, even in combination with all other considerations, to lead me to conclude that the consultation requirements under section 20 can be dispensed with under section 20 ZA.

#### **LVT's Issue 5**

44. There was no appeal against the LVT's decision on its Issue 5.

#### **Further Procedural Point – The Appellants' Late Documents**

45. The LVT gave particular consideration to the service charges payable for the year 2004/2005. As regards this year the LVT had available the budgets for 2004/2005 for the individual blocks. The LVT had ordered the Appellants to provide relevant documentation to show the calculation of the service charges, see page 272 of the bundle (order dated 15 June 2005 – see paragraph 20 above) and I was told that a further specific order for disclosure of these documents was made on 4 October 2005, the day before the first day of the hearing, which was concluded at an adjourned hearing on 3 November 2005. Prior to the documents next mentioned the Appellants had failed to provide any documents to show the service charge expenditure for any years earlier than 2004/2005. However with their written closing submissions the Appellants sent to the LVT the documents which are at the bundle at pages 765 and following. The LVT considered that this late documentation was inadmissible as it

had not been produced at the hearing and the Respondents had not had any opportunity to raise questions or comments upon such documentation.

46. Mr Bayne submits that this additional documentation would have been much more instructive to the LVT for the calculation of service charges for earlier years than the 2004/2005 budgets, which the LVT extrapolated backward.

47. In my judgment the LVT was placed in a difficult position by the Appellants' failure to comply with orders for disclosure of documents which were obviously relevant. The LVT was obliged, having regards to its duties under section 27A of the 1985 Act, to reach a conclusion as to the service charge payable by each of the Respondents in respect of each year in respect of which that Respondent had made an application for the determination of the amount of service charge payable. The LVT could only proceed on the evidence before it. Accordingly, leaving aside the late documentation at page 765 and following, the LVT was in my judgment entitled to do the best it could and to calculate the service charges payable for the earlier years by extrapolating backwards from the service charges payable for 2004/2005.

48. The question therefore is whether the LVT was in error in refusing to take into consideration the late documentation. It would have been open to the LVT to have reconvened the hearing so that the Respondents could raise questions upon the late documentation or could make submissions upon it. However in my judgment the LVT was not obliged to do so, especially bearing in mind that this late documentation was not documentation as contemplated by the relevant leases (i.e service charge accounts duly certified by the auditors or accountants). Also I note that, as pointed out by Captain Joachim at the hearing, this late documentation appears to be inconsistent with certain documentation which was before the LVT, see for example the bundle at page 413 as compared with pages 766 to 768.

49. I am unable to say that the LVT erred in principle in declining to take this late documentation into account. The LVT reached a permissible conclusion as to the service charges payable in earlier years based upon the material which was properly before it. I am unable to say that its conclusions on these points were wrong. I cannot and do not interfere its conclusions on these points or with its decision to exclude from consideration the late documentation.

### **Section 20 C Applications**

50. All of the Respondents made application to the Lands Tribunal under section 20C of the Landlord and Tenant Act 1985 as amended for an order that the Appellants' costs in connection with these proceedings before the Lands Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents. Under Section 20C(3) I may make such order as I consider just and equitable in the circumstances. So far as concerns the general merits of the applications to the LVT by the Respondents (being the applications which have led to the present appeal) I note and agree with the observations of the LVT in paragraph 144 of its decision. The fact that I have

concluded, upon the legal points argued by the Appellants in relation to Issue 1 and the restitutionary orders made by the LVT, that the LVT's decisions on these points cannot be upheld is no reason for my not reaching the same conclusion on the section 20C applications as reached by the LVT. The Respondents were entirely justified in making their applications to the LVT. The Appellants brought the applications on themselves. I order that in respect of all of the Respondents the Appellants' costs in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Respondents.

### **General**

51. At the hearing certain of the Respondents informed me of alleged ongoing problems at the Quayside development and made reference to various further alleged failures by the Appellants and the presently acting managing agents. Mr Bayne indicated that these allegations were not accepted and he pointed out that, bearing in mind the ambit of this appeal, these later allegations were not before me for decision and that I had no evidence upon them (the hearing before me being limited to argument upon the facts as found by the LVT). I accept that Mr Bayne is correct that these later allegations are not matters for me to decide in these proceedings. I do however consider it appropriate to record that Mr Wakley expressly stated (and this seemed to be the sentiment of most if not all of the Respondents) that he was a party to the present proceedings more in sorrow than in anger and that there has got to be a long term amicable answer. In response Mr Bayne for the Appellants said that it was in everyone's interests for the present problems to be resolved and for the parties to rub along (as he put it). I agree that the identification and pursuit of a satisfactory and amicable answer to the present problems would appear to be a highly desirable course. The alternative could potentially involve substantial litigation over a range of matters.

### **Summary of the Decision**

52. For the reasons set out above I allow the Appellants' appeal but only to the following extent. Save as expressly hereafter stated I dismiss the Appellants' appeal:

- (1) I allow the Appellants' appeal on Issue 1 in that I find that the LVT was wrong in its construction of the relevant leases when it concluded that no service charges at all were payable by any of the Respondents for any of the relevant service charge years.
- (2) I find instead that the amount payable by each Respondent for each service charge year relevant to that Respondent is the amount found to be so payable by the LVT in paragraph 143 of its decision, where it makes its determination as to what would be so payable but for its decision on Issue 1.
- (3) Where a Respondent has paid on account in respect of a service charge year more than is properly payable for that year (i.e. more than is payable having regard to the finding in subparagraph (2) above), I find that the overpayment must be credited in WQMC's accounts in accordance with paragraph 2 of the Fourth Schedule to the lease against future payments which fall due from that

Respondent to WQMC. I find that the LVT was wrong in its conclusion that it could order repayment to be made to the Respondents by the Appellants.

- (4) I find that the LVT erred in omitting to consider the question of whether it was reasonable to dispense under section 20 ZA with the consultation requirements. I have therefore myself considered this matter. However I conclude that the consultation requirements should not be dispensed with.

53. I make the orders under section 20C in respect of each Respondent as is recorded in paragraph 49 above.

54. So far as concerns the costs of these proceedings in the Lands Tribunal, the power of the Lands Tribunal to make any order for costs is much restricted by the provisions of section 175 of the Commonhold and Leasehold Reform Act 2002. No application for costs was made by any party and it is right I should record that, even if such an application had been made, I would have declined to make any such order for costs.

55. After the close of the hearing on 2 November 2007 I received a communication from Captain Joaquim with certain enclosures, which were copied to the Appellants' solicitors and to which those solicitors responded. On 11 January 2008 (after I had finalised my conclusions and only a short time before signing this Decision) I received a copy of Mr Hewitt's email dated 9 January 2008 to the Lands Tribunal. There is nothing in either of these communications which affects my conclusions, nor is there anything on which it is appropriate for me to comment bearing in mind the ambit of the matters before me in this appeal.

Dated 11 January 2008

His Honour Judge Huskinson